89-1771

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

STATE OF NORTH CAROLINA;
ATTORNEY GENERAL OF NORTH CAROLINA,

Petitioners,

v.

SAINT LUKE GREGORY, JR.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Under the confrontation clause, is there a requirement that indicia of reliability for hearsay be contemporaneous with it or may events and statements occurring at other times also supply these indicia?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 4

REASONS THE WRIT SHOULD ISSUE 7

CONCLUSION 9

TABLE OF AUTHORITIES

Page

Huff v. White Motor Corp., 609 F.2d 286 (7th Cir. 1979) 9

Nelson v. Farrey, 874 F.2d 1222 (7th Cir. 1989) 8

United States v. Dorian, 803 F.2d 1439 (8th Cir. 1986) 8

United States v. Renville, 779 F.2d 430 (8th Cir. 1985) 9

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SAINT LUKE GREGORY, JR.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in the case of *St. Luke Gregory, Jr. v. State of North Carolina, et al.*, ___ F.2d ___ (4th Cir., April 4, 1990) *affirming St. Luke Gregory, Jr. v. L. E. Cherry, et al*, Civil 87-424-HC, unpublished (E.D.N.C., Nov. 14, 1988).

OPINION BELOW

The opinion of the United States Court of Appeals is not yet reported but a copy of it is attached as

Appendix A to this petition. The District Court opinion is attached as Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC §1254(1) within ninety days of the date of decision, April 4, 1990.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Confrontation Clause of the Sixth Amendment which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him, . . . "

STATEMENT OF THE CASE

St. Luke Gregory, now paroled, is a former prisoner of the State of North Carolina who, at the April 22, 1985 Session of Pasquotank County, North Carolina, Superior Court entered a plea of not guilty in case 84-CRS-3143 in which he was charged with rape, incest and taking indecent liberties. He was tried by jury before which he did not testify but did offer other evidence, was convicted of attempted first-degree rape, incest, and taking indecent liberties, and was sentenced to imprisonment for ten years on the attempted first-degree rape conviction and for a consolidated consecutive sentence of ten years on

the remaining two charges. Gregory appealed his convictions to the North Carolina Court of Appeals which affirmed those for attempted first-degree rape and taking indecent liberties but vacated judgment on the incest charge due to insufficient evidence, 78 N.C.App. 565, 338 S.E.2d 110 (1985), with the North Carolina Supreme Court denying certiorari on April 7, 1986, 316 N.C. 382, 342 S.E.2d 901. On March 5, 1986, Gregory was resentenced to five years imprisonment for indecent liberties.

Gregory later commenced this action by a *pro se* application for writ of habeas corpus in the United States District Court for the Eastern District of North Carolina, filed May 20, 1987, Civil 87-424-HC. For purposes of argument before Magistrate Wallace W. Dixon, James R. Parish, Esquire, of the Cumberland County, North Carolina Bar, was appointed to represent Gregory. Following argument and by memorandum of October 7, 1988, Magistrate Dixon recommended issuing the writ on the grounds that three hearsay statements were admitted in evidence against Gregory in violation of his right to confrontation. The State filed objections on October 20, 1988 and Honorable James C. Fox, United States District Judge, accepted in part and rejected in part the Magistrate's recommendation on November 14, 1988, finding admission of only one of three statements was error. The State then appealed on December 12, 1988 to the United States Court of Appeals which affirmed in an opinion filed April 4, 1990, *Gregory v. North Carolina*, ___ F.2d ___, No. 89-7514.

STATEMENT OF THE FACTS

Gregory was charged with three sexual offenses occurring on September 7, 1982. The victim was his infant daughter, LaTonya, a three and a half year old. She was found incompetent to testify after pre-trial hearing because she was incapable of expressing herself in an understandable fashion concerning the matters alleged to have occurred and incapable of understanding her duty as a witness to tell the truth. As a result, the State's case was largely proved through statements made by the child to her grandmother, Doris Griffin, and to an examining physician, Dr. Green, with similar statements made to a social worker being excluded as unreliable. Two statements to the grandmother were admitted. The first was three-four months before the crimes at issue here and was "Grandma, my Daddy pooted in my butt". This was said shortly after LaTonya had been brought to her grandmother's house by her father at 6:00 a.m. to be kept for the day while her parents worked. In response to it, she was told to "shut up". This statement is referred to as the "June statement" in the decisions below, and was used as circumstantial, other-crimes evidence of the September 7 offenses. The statement on the day of the crime, September 7, also occurred a little while after 6:00 a.m. when LaTonya again had been brought to her grandmother's by her father. As LaTonya's grandmother prepared to bathe her, she noticed a pus-like discharge in LaTonya's pants and between her legs. LaTonya then said "my Daddy put it in my butt" and pointed to her genital area. Mrs. Griffin had previously seen this type of discharge when LaTonya was 17 months old and had had gonorrhea, at the same time as her father. Other statements by LaTonya

to Mrs. Dixon on September 7 were that it happened while she was with her father, her mother was asleep, and it was painful.

Mrs. Dixon took LaTonya to the hospital where at 1:14 p.m., she was examined by Dr. Green. He talked with LaTonya ten minutes to gain her confidence; afterwards talked with Mrs. Dixon privately; and then outside her presence, had LaTonya relate the incident to him, which she did as follows:

> She told me personally and, again, I just asked her to relate what happened. She said that her daddy unzipped his pants and "told me do my legs apart," and she showed me by the spreading of her legs, and he – those are my words. These are her words: "Wanted to get close to me," and the fourth part of this continuous sentence was that "that he hurt me here," and she pointed to between her legs. That's the sum total of what she told me just by asking her what had happened to her.

Dr. Green's physical examination revealed irritation, infection and soreness consistent with LaTonya's account. Lab tests showed no sperm or gonorrhea, although it confirmed the infection. Physical examination did not reveal penetration by an entire width of a penis, although Dr. Green testified the injury could have been caused in the manner LaTonya claimed.

Judge Fox held the two statements on September 7 to be admissible because of the following twelve indicia of reliability: (i) the unique features of the parent-child relationship which have a tendency to suppress information about child molestation; (ii) LaTonya's father had custody of her on September 7, 1982, before dropping her off at

her grandmother's; (iii) just prior to dropping her the child might have ordinarily been in her parents' bed and her mother would have been asleep; (iv) molestation was inferable from the condition of LaTonya's pants; (v) molestation was also inferable from the medical examination, which had shown that an abnormal irritation and inflammation occurred; (vi) LaTonya's explanation was similar to a statement made three months earlier (to which it might be added that this had evoked an unpleasant response from the grandmother – being told "shut up"); (vii) both LaTonya and her father previously had had gonorrhea; (viii) LaTonya's explanation on September 7 was repeated to Dr. Green, outside her grandmother's presence; (ix) the inference from the evidence is that LaTonya perceived the doctor's role was to help her; (x) LaTonya's versions were consistent; (xi) at LaTonya's age – three and a half years – she would have had little motivation to fabricate (or, it may again be added, to artificially keep her statements consistent); (xii) nothing appears of record indicating coercion to identify her father. In addition to the things Judge Fox found and the additions noted in the parentheses above, at least three other things appear as indicias of reliability: (xiii) LaTonya was apparently in pain when she told her story; (xiv) the physical evidence of abuse was discovered by the grandmother incidental to her bathing LaTonya, rather than LaTonya's volunteering this the second time; and (xv) the apparent spontaneity of the earlier June statement. These facts show that the earlier June statement was admissible under the Confrontation Clause.

REASONS THE WRIT SHOULD ISSUE

IN CONTRAST TO DECISIONS IN TWO OTHER CIRCUITS, THE FOURTH CIRCUIT HAS FOISTED A RESTRICTIVE AND INAPPROPRIATE LIMITATION ON THE INDICIA OF RELIABILITY WHICH MAY BE USED TO DECIDE CONFRONTATION CLAUSE QUESTIONS.

The Fourth Circuit's decision holds that the indicia of reliability necessary for hearsay to meet confrontation clause requirements must be present at the time the statement is made and that events or facts that are not contemporaneous cannot be used as these indicia. Although contemporaneity is a frequent attribute of the hearsay analyzed in this Court's cases, there has never been a statement that this is required and there is often no reason for it.

The September 7 statement, the reliability of which was upheld in the district court and was unchallenged on appeal, involves the use of similar language to that used in June; the two were not remote from one another; and the type of crime – sexual child abuse – is often one of continuing, intermittent episodes. All of these reasonably lead to the conclusion that the factors showing the September 7 statement reliable may (and here do) also show the June statement is. This occurs in two ways. First, the (reliable) September 7 statement itself, if believed to have been made, provides an indicia of reliability for the June statement. Second, eight of the twelve indicia for the September 7 statement (all but iv, v, viii, and ix) also appear to apply directly to the June statement.

The Fourth Circuit seems to go wrong in two places in this case. The first is in its belief that the September 7

statement must show that the June statement "must also be true", p. A-11, *post*. However, what must be shown is only that the June statement is possibly true so that it can then be evidence that the September 7 statement is true. The September incident, not the June one, is what Petitioner is on trial for. Other references to this reasoning appear in the form of statements that the June remark left "unclear" whether Petitioner had the opportunity to commit an assault at that time, p. A-12, *post*, when this would be only one thing to consider; that the June remark must reveal that a third incident occurred, p. A-14, *post*, when again it need only show that one may have occurred; and the assertion that the June remark is as consistent with two incidents having occurred as it is with three, p. A-14, *post*, when there is no more-likely-than-not requirement for reliability. The second mistake seems to be a requirement that the 1982 gonorrhea infection must have inspired the June statement, pp. A-13-14, *post*, in order for the infection to be considered in determining the reliability of the statement when there is no requirement of cause between the two, but only that the 1982 incident or other things give some indication that the June statement could be true and thereby indicative of the crime occurring in September.

The Fourth Circuit's requirement of contemporaneous indicia of reliability also conflicts with the use of non-contemporaneous indicia in cases from two other circuits, *Nelson v. Farrey*, 874 F.2d 1222 (7th Cir. 1989); *United States v. Dorian*, 803 F.2d 1439 (8th Cir. 1986). In *Farrey*, hearsay statements made from January to September, 1984 were used to corroborate statements and prove offenses in late 1983. In *Dorian*, statements made July 10 were used to corroborate an offense occurring in mid-June, although

references are made at p1444 to a case which seemingly requires contemporaneity, *United States v. Renville*, 779 F.2d 430 (8th Cir. 1985). *Renville* was decided on non-constitutional grounds and relied on language in another non-constitutional case, *Huff v. White Motor Corp.*, 609 F.2d 286, 292 (7th Cir. 1979). These last two cases, however, dealt with wholly different matters than the one at issue here and in *Dorian*.

CONCLUSION

For the three reasons noted above – (i) lack of any requirement that indicia of reliability be contemporaneous with the hearsay evaluated; (ii) analysis of the issue involving a substitution of a requirement of truthfulness for indicia of reliability; and (iii) a conflict within the circuits – this Honorable Court should issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit and summarily reverse its decision in this case.

This 14th day of May, 1990.

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APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 89-7514

ST. LUKE GREGORY, JR.,

Petitioner-Appellee,

versus

STATE OF NORTH CAROLINA; ATTORNEY GENERAL OF NORTH CAROLINA,

Respondents-Appellants.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. James C. Fox, District Judge. (CA-87-424-HC)

Argued: July 12, 1989 Decided: April 4, 1990

Before ERVIN, Chief Judge, and PHILLIPS and WILKINSON, Circuit Judges.

Affirmed by published opinion. Chief Judge Ervin wrote the majority opinion, in which Judge Phillips joined. Judge Wilkinson wrote a dissenting opinion.

ARGUED: Richard Norwood League, Special Deputy Attorney General, Raleigh, North Carolina, for Appellants. James Riley Parish, PARISH, COOKE & RUSS, Fayetteville, North Carolina, for Appellee.

ON BRIEF: Lacy H. Thornburg, Attorney General, Raleigh, North Carolina, for Appellants.

ERVIN, Chief Judge:

St. Luke Gregory, imprisoned by North Carolina for taking sexual advantage of his young daughter, brought this Section 2254 case challenging the admission of two hearsay statements identifying him as the assailant. Gregory argues that the statements were so untrustworthy as to have violated his Sixth Amendment right to confront his accuser. The district court agreed that statements the child made several months before the crimes occurred were too unreliable to support the conviction, and ordered relief in the form of a new trial. We affirm.

I.

A jury concluded that Gregory had sexually assaulted his daughter LaTonya, then three-and-a-half years old, in September, 1984. Some of the most damning evidence against Gregory came in testimony from LaTonya's maternal grandmother, Doris Griffin, who often babysat the child while Gregory and his wife, LaTonya's mother, worked.[1]

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[1] LaTonya did not testify. N.C. Superior Court Judge Small presided over Gregory's trial and the *voir dire* hearing on Gregory's motion to suppress LaTonya's testimony. The judge observed that LaTonya, while brighter than average, could not intelligibly express what had happened, and could not appreciate her obligation to tell the truth. Though physically available and, apparently, present for at least some of the trial, LaTonya was declared an incompetent witness, leaving hearsay the only route by which her story could come before the jury.

In June, 1984, and again on September 7, 1984, Gregory dropped LaTonya off at Griffin's home and proceeded to work. During both visits, LaTonya exclaimed something like "Daddy put it in my butt", a remark the parties agree connotes a sexual contact between father and daughter.[2]

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[2] What Griffin reports LaTonya to have said in June was "Grandmama, my daddy pooted in my butt." We believe, and the parties impliedly agree, that this statement imported to the jury the same message as the less ambiguous September remark "Daddy put it in my butt."

Griffin's testimony follows verbatim. After describing her discovery of what looked like pus between LaTonya's legs on September 7, the exchange between Griffin and the prosecutor was as follows:

Q: First, did she [i.e. LaTonya] tell you something?

A: Yeah. She told me her daddy put it in her butt.

* * *

Q: Okay. And did she point or anything like that at that time?

A: Yeah. She pointed down there.

Q: All right. Where did she point to?

A: In front. Below.

A: Okay. After she said that "My daddy put it in my –" Were those her words, "My daddy put it in my butt?"

A: Yes.

Griffin subsequently related what passed between her and LaTonya several months earlier.

(Continued on following page)

The September remark finds corroboration in Griffin's discovery of a substance, apparently pus, on

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Q: Okay. How long – how much time was it before the September 7th incident?

A: About three months.

* * *

Q: Where was it that [LaTonya] spoke to you?

A: In the house. As you enter the house.

Q: About what time was it?

A: About six or a little after six.

Q: In the early morning?

A: Yes.

Q: And how had she gotten to your house?

A: I think her father brought her.

Q: Okay. And what was she doing at your house?

A: I kept her days.

Q: You were babysitting then?

A: Yes.

Q: And what, if anything, – okay. How long had she been in the house when she spoke to you?

A: She just spoke and then she told me that.

Q: Okay. What was the first thing she said to you?

* * *

(Continued on following page)

LaTonya's panties and testimony that LaTonya would not allow her to touch her crotch because it hurt. Dr. Phillip Greene, who examined LaTonya later that day, testified that "[LaTonya] said that her daddy unzipped his pants and "told me do my legs apart," and she showed me by the spreading of her legs, and he – those are my words. These are her words: "Wanted to get close to me," and the fourth part of this continuous sentence was that "that he hurt me here," and she pointed to between her legs."[3]

(Continued from previous page)

A: The first thing she said to me, she said, "Grandmama, my daddy pooted in my butt."

Q: And what did you say to her?

A: I told her, "Shut up." I would tell her mother when she came in from work.

* * *

Q: Okay. From that day up until September the 7th, 1984, at any time did she ever discuss the – did you ever discuss the matter with LaTonya again?

A: No, – no.

[3] The trial court allowed Greene to relate LaTonya's statements under N.C. R. Evid. 803(4), which allows for the admission of hearsay statements given for purposes of medical diagnosis. The North Carolina Court of Appeals, in its decision reversing Gregory's conviction in part, affirmed the application of 803(4) to Greene's testimony, and held the provision applicable as well to Griffin's hearsay testimony about what LaTonya told her on September 7. *State v. Gregory*, 78 N.C. App. 565, 338 S.E.2d 110 (1985).

The Court of Appeals also suggested that Griffin's hearsay testimony about LaTonya's June statements, admitted under

(Continued on following page)

No contemporaneous evidence corroborates LaTonya's June statement. Griffin noticed nothing in LaTonya's appearance or conduct that triggered suspicion, and seems to have dismissed the remark as a naive impertinence.

A Dr. Beals testified that on September 13, 1982, he had diagnosed gonorrhea in the seventeen-month-old LaTonya. Beals observed that sexual congress is the means of transmitting gonorrhea "almost in every case known", and that the probability of infection by other means is very slight. Other evidence indicated that Gregory had been treated for gonorrhea at about the same time.[4]

The district court accepted the magistrate's recommendation that it rule the June hearsay inadmissible, finding "absolutely no objective corroborative evidence of the abuse reported at that time." The court viewed LaTonya's September statements to Griffin and Greene in

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the excited utterance exception of N.C. R. Evid. 803(2), might have come in under 803(4) as well. Holding the hearsay at worst harmless error, the court found it unnecessary to speak firmly to the admissibility of the September 7 hearsay. The court similarly held the admission of the gonorrhea test results no more than harmless error.

[4] The trial court admitted proof of LaTonya's and Gregory's treatment for gonorrhea under N.C. R. Evid. 404(b), as evidence of a prior bad act showing identity. Griffin testified that she had seen the pus-like substance she discovered on September 7 once before, when LaTonya was seventeen months old, but did not state to the jury that the earlier observation signaled gonorrhea.

a different light, rejecting the magistrate's counsel that it hold these two inadmissible also. Identifying a dozen factors corroborating the September statements, the district court concluded that while it "is on the cutting edge of the issue of relaxation of confrontation clause requirements", the indicia of reliability associated with the statements warranted admission.[5]

II.

The issue for our review is one arising with depressing frequency in our nation's courts, one that, as a sister Circuit has observed, "place[s] a strain on traditional notions of procedural justice." *Nelson v. Farrey*, 874 F.2d 1222, 1224 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 835 (1990) (citations omitted). The victim and principal witness to the crime charged is, by virtue of the youth that made her so vulnerable, unable to give reliable testimony. Her absence deprives the accused of the opportunity to cross-examine his accuser, an opportunity that, though some aver it a poor way to elicit truth from a very young child, our system holds dear. *Id.* at 1230; *The Supreme Court, 1987 Term: Leading Cases*, 102 Harv. L. Rev. 143, 157 (1988).

In *Ohio v. Roberts*, 448 U.S. 56 (1980), the Court promulgated a rule mediating between the accused's interest in confrontation, [and broadly in the best exposition of the truth,] and the victim's and society's interest in the

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[5] Gregory has not cross-appealed from the portion of the district court's order condoning admission of the September hearsay through the testimony of Griffin and Greene. Our analysis accordingly treats only the admissibility of the June hearsay.

effective prosecution of child abuse. The rule allows the admission of hearsay evidence from an unavailable declarant if, though not within any well-recognized exception to hearsay exclusion, the evidence bears "particularized guarantees of trustworthiness."[6] *Id.* at 66. It is the district court's *Roberts* analysis that we review today.

In this case, the issue is whether we may look a considerable distance backward and forward from June of 1984 – principally to the 1982 diagnosis of gonorrhea and the events of September of 1984 – for corroborating

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[6] The threshold test for admissibility under *Roberts* is whether the hearsay declarant is "unavailable" to testify. 448 U.S. at 66. Roberts left unclear whether the unavailability requirement applies with equal force in all cases, suggesting as it did the option of compressing its two-part test into a single inquiry into reliability when the utility of confrontation is shown to be remote, as when the declarant is too immature for meaningful cross-examination. 448 U.S. at 65 n.7 (citing *Dutton v. Evans*, 400 U.S. 74 (1970)); *see also United States v. Inadi*, 475 U.S. 387, 396 (1986).

We have, like other circuits, as a general matter held child abuse victims found incompetent to be "unavailable" under *Roberts*. *Ellison v. Sachs*, 769 F.2d 955, 957 n.4 (4th Cir. 1985); *see also United States v. Dorian*, 803 F.2d 1439, 1446-47 (8th Cir. 1986); *Haggins v. Warden*, 715 F.2d 1050, 1055 (6th Cir. 1983); *United States v. Iron Shell*, 633 F.2d 77, 87 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981); *United States v. Nick*, 604 F.2d 1199, 1202 (9th Cir. 1979). We agree with the district court that LaTonya, incompetent due to immaturity, was "unavailable" and pass to the knottier question of whether her June statement bore sufficient indicia of reliability to have comported with Gregory's Sixth Amendment right to confront her.

factors. This issue is novel to us. The district court, referring to a portion of the magistrate's decision citing cases from two other courts of appeals, stated that it would address the statements' reliability in light of contemporaneous circumstances. *See United States v. Renville*, 779 F.2d 430, 440 (8th Cir. 1985) ("[T]he reliability of the declaration is assessed in light of the circumstances at the time of the declaration and the credibility of the declarant.") (citing *Huff v. White Motor Corp.*, 609 F.2d 286, 292 (7th Cir. 1979)); *see also United States v. Dorian*, 803 F.2d 1439, 1444 (8th Cir. 1986)(quoting the *Renville* contemporaneity requirement); *United States v. Love*, 592 F.2d 1022, 1027 (8th Cir. 1979). As we shall explain, even if we disagreed with the well-reasoned requirement of contemporaneous corroboration, a requirement implicit in the *Roberts* insistence on "particularized" guarantees of reliability, we nonetheless would hold the chronologically distant evidence presented in this case to be a logically insufficient index of the reliability of the June hearsay.

No doubt because of the relative novelty of the *Roberts* exception and the fact-specific examination each *Roberts* inquiry demands, the cases, rather than publishing a comprehensive list of possible corroborating factors, tend to consider what, in the declarant's condition or otherwise, suggests truthfulness or a lack thereof. For example, in *Ellison*, the district court referred to the many discrepancies among the five-year-old sexual assault victim's descriptions of her assailant and the place of her assault in concluding that admission of the descriptions as hearsay violated the accused's Sixth Amendment rights. *Ellison v. Sachs*, 583 F. Supp. 1241, 1249 (D. Md. 1984), *aff'd*, 769 F.2d 955, 957 (4th Cir. 1985)("[A]s the

district court documented in careful detail, there are serious discrepancies which indicate that the victim's out-of-court statements and identification of Ellison were not at all reliable.")

In *Morgan v. Foretich*, 846 F.2d 941 (4th Cir. 1988), one issue before the panel was whether the district court had abused its discretion in ruling five statements made by a young girl to her mother, all suggesting sexual abuse by the girl's father, inadmissible under the excited utterance exception to the hearsay exclusion.[7] Fed. R. Evid. 803(2). We noted "substantial physical evidence and doctors' testimony" corroborating the girl's tales of sexual assaults, which she described in childish terms but with an "extensive knowledge of sexual activities," both characteristics belying an attempt at fabrication. 846 F.2d at 948. The girl's near-hysterical condition left "little doubt . . . that she was acting under the stress of the situation." *Id.*

We find it impossible to weave the factors influential in *Ellison* and *Morgan*, or the principles informing the factors, into a justification for the admission of the June hearsay. As we have said, there is no corroborating evidence peculiar to the June statement. The September developments alone cannot bootstrap the earlier statement

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[7] *Morgan* arose as an appeal from a jury verdict for the defendants in a suit by mother and daughter against the father and his parents for damages arising from the alleged sexual abuse. The contested evidentiary rulings having run in defendants' favor, the panel had no occasion to address an argument that admitted hearsay contravened the *Roberts* minima for reliability. *Morgan* discusses "factors of trustworthiness" in its 803(2) analysis, however, and so is instructive in our analysis.

into a category of reliable hearsay. It is a considerable leap from the varied evidence that Gregory sexually abused LaTonya in September to the conclusion that LaTonya's tantalizing hint of an earlier assault must also be true. In this case, at least, where the trial court ruled the declarant incompetent because of her proclivity to "make up things," including things about her father, and inability to appreciate the need for truthfulness, we are unable to see how the corroborated September statement relates favorably enough to the truthfulness of the June statement to overcome the complete absence of contemporaneous corroboration for the latter. *See Dorian*, 803 F.2d at 1444 (emphasizing the declarant's credibility as a factor in evaluating reliability); *Renville*, 779 F.2d at 440 (same).

We consider first the substance of the statement itself, then consider whether evidence extrinsic to the statement reflects favorably on its truth.[8] Without making light of what certainly happened to LaTonya in September, we can imagine a very young child, particularly one so bright, blithely making a sexually charged reference based on something she encountered on television or elsewhere.[9] The reference might improperly describe an

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[8] As we have said, there is no contemporaneous corroboration for the June statement in the usual sense, that is in evidence other than the statement itself. Most courts examining such cases, however, include within the definition of corroborating evidence characteristics of the statement making it more likely reported fact than fiction. *See, e.g. Nick*, 604 F.2d at 1204 (certain statements of an alleged child abuse victim may have "the ring of verity").

[9] Several sources have noted the unfortunate irony that increased education about child sexual abuse may increase the

(Continued on following page)

innocent contact by the father. Not a detailed account of an event ordinarily beyond a child's experience, LaTonya's remark is less credible *per se* than the tales of abuse recounted in *Ellison* and *Morgan*. *Cf. Ellison*, 769 F.2d at 957 ("[S]everal courts and commentators have observed that a young child's description of a sexual assault may, in particular circumstances, contain its own inherent verity.") (citations omitted). The June remark did not indicate when the contact had occurred, leaving unclear whether Gregory might have had the opportunity to commit the assault.

At least as troubling as the problematic significance of the June remark *in se* is the lack of any extrinsic evidence indicating LaTonya had undergone a recent sexual assault. LaTonya made her remark only minutes after Gregory left, when the excitement and fear induced by her assailant's presence would likely persist. Griffin, however, familiar as she was with LaTonya's personality and solicitous, as we infer, of her welfare, read nothing in her manner to lend credence to the remark.[10]

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number of false alarms raised by children who mistake innocent contacts or overtures for malignant advances. *See* Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 Harv. L. Rev. 806, 820 & n.94 (1985).

[10] Griffin testified that her daily routine when tending LaTonya included bathing the child. Unlike her account of LaTonya's state on September 7, Griffin did not testify to having observed anything in the child's physical condition suggesting recent sexual abuse.

Reflection on the corroborative value of the 1982 diagnosis of gonorrhea reveals many of the problems we associate with corroboration by the September evidence. The conclusions we must make to link the diagnosis and the June statement are these: the diagnosis implies a sexual contact between Gregory and LaTonya, and the statement reflects either that contact or one closer in time to June, 1984. We will assume the truth of the first and consider in turn the reliability of the second and third conclusions.[11]

We cannot confidently conclude that an instance of abuse in 1982 inspired the June statement. We must resist the temptation to decide that, because we would likely find the diagnosis sufficient corroboration for the remark if they had occurred at about the same time, the two years intervening between the events is insignificant. On the contrary, the time is likely more significant in the context of a very young declarant. We are not sure, and the record holds no evidence, that LaTonya would have remembered a sexual incident occurring at seventeen months, at least in the terms she used in the June statement. LaTonya could not have made the statement under the excitement of the two-year-old incident, at least not in any sense of excitement yet recognized under 803(2).

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[11] That the 1982 diagnoses reveal a sexual contact between Gregory and LaTonya is by no means a settled fact, although the conclusion seems indispensable use of the diagnoses as corroboration for the June remark. Also, this evidence of gonorrhea in 1982, which is stressed in the dissent, loses much of its impact when it is recalled that Gideon Griffin, LaTonya's uncle who lived across the street, was also diagnosed as having gonorrhea on August 19, 1982.

Absent any evidence why LaTonya would have kept quiet about the incident for so long, or by contrast why she would have chosen June, 1984, to speak of it, the time between diagnosis and statement gives ample reason to doubt a causal relationship.

The circularity of the second conclusion, that the remark suggests a pattern of abuse, is clear. While we assume sexual abuse in 1982, and are confident of abuse in September, 1984, only by assuming as well what we are charged with deciding – that the June, 1984, remark reveals a third incident – may we conclude that the remark is reliable in indicating a pattern corroborated by the evidence of a 1982 contact. The remark is, on the evidence, as consistent with two discrete incidents as with a pattern of which these corroborated incidents are but a part. Without some evidence suggesting abuse between 1982 and September, 1984, then, there is no sound basis to extrapolate an intervening incident. This tautology, and the temptation to ignore it, confident that a young child would not suggest sexual abuse if it had not occurred, point up the wisdom of a rule requiring at least some contemporaneous corroboration.

III.

We now consider whether admission of the June hearsay was harmless beyond a reasonable doubt.[12] The

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[12] *Coy v. Iowa*, 487 U.S. 1012, 108 S. Ct. 2798, 2803, 101 L.Ed.2d 857, 867 (1988) makes plain that the harmless error standard of *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967) applies in cases revealing violations of the Confrontation Clause.

district court agreed with the magistrate's conclusion that the error was not harmless, "inasmuch as [LaTonya's] identification of [Gregory] was the sole source of identification as to the perpetrator of the crime" and notwithstanding its decision that the September hearsay was admissible.

We similarly believe that the jury might well have taken LaTonya's June statement, phrased so similarly to her September exclamation to Griffin, as sound corroboration for LaTonya's September identification of Gregory as her assailant. Without the June statement, and with some benign means of contracting gonorrhea a possibility, the jury might have had less confidence in LaTonya's identification.[13] Uncertain whether the June hearsay was significant to the jury, we must hold admission of the hearsay harmful error warranting *habeas* relief.[14]

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[13] The doubts about LaTonya's credibility that led to the incompetency ruling are apposite to this as well as the Sixth Amendment portion of our analysis. Although the jury was not aware of the information in the same fashion, we have in mind also LaTonya's testimony at the *voir dire* hearing that it was fun to make things up, including things about her father, that she would tell things that did not happen, and that her mother and grandmother had told her what to say at the hearing.

[14] In addition to our conviction that this is not a "harmless error" case, we are unwilling to use this analysis where the State does not rely upon it. Despite the North Carolina Court of Appeal's lead, the State did not argue it to the district court, nor present it in its briefs or argument to us. On the contrary, the State's representative, during oral argument, declared "I did not argue harmless error," and declined to adopt it on appeal despite several opportunities to do so.

III.

For the reasons presented in the preceding sections, we affirm the district court's decision finding a violation of Gregory's rights under the Confrontation Clause and ordering relief in the form of a new trial.

AFFIRMED

WILKINSON, Circuit Judge, dissenting:

The majority holds that St. Luke Gregory's conviction for taking sexual advantage of his daughter must be overturned because one of two virtually identical hearsay statements identifying him as the assailant was, in its view, erroneously admitted into evidence. At bottom, the majority doubts the reliability of a jury verdict in a case where a father and his three-year-old daughter had simultaneously been diagnosed with gonorrhea, a sexually transmitted disease. If this verdict is unreliable, then I fear reliability in prosecutions for the sexual abuse of very young children is beyond our grasp. Because the evidence supports this conviction beyond any reasonable doubt, I would hold any error in the admission of the statement harmless and reverse the grant of habeas corpus by the district court.

The pervasive error the majority commits is plain. It will not permit the 1982 diagnosis of gonorrhea to support the admission of the June 1984 hearsay statement because the diagnosis and the statement were not "contemporaneous." It holds that, under *Ohio v. Roberts*, 448

U.S. 56, 66 (1980), the "particularized guarantees of trustworthiness" for hearsay statements must be contemporaneous as well. The *Roberts* Court did not embrace that narrow view, and I dissent from its adoption by the majority. Under the majority's analysis, no evidence of prior sexual abuse could support the trustworthiness of a child's later statement. The Eighth Circuit took a contrary position in *United States v. Dorian*, 803 F.2d 1439, 1444-47 (1986), and I agree with its reasoning.

I.

At issue here are two statements made by three-year-old LaTonya in June, 1984 and on September 7, 1984 as reported by her grandmother, Doris Griffin. One morning in June, immediately after her father dropped her off at Griffin's house, LaTonya stated, "My daddy pooted in my butt." Her grandmother told the child to "Shut up," and notified LaTonya's mother of the statement. Similarly, on September 7, again after her father had delivered her to Griffin's house, LaTonya stated, "My daddy put it in my butt." On that occasion, LaTonya also was found by her grandmother to have a thick, white discharge between her legs and she complained of pain in her genital area. The physician who examined LaTonya that afternoon in connection with these complaints found the presence of redness, irritation and puss-like discharge in her vaginal area. He diagnosed the condition as vaginitis, which he testified "fully supported" the child's statements describing sexual abuse. The district court held that the September statement was reliable.

This case is paradigmatic of situations where there may have been repeated instances of child abuse and the child may well have made statements about a number of them. *See e.g., Morgan v. Foretich*, 846 F.2d 941, 945-46 (4th Cir. 1988). The majority bases its decision, in part, on the view that LaTonya was too young to give reliable testimony, but if that were the end of the matter, the protection offered by law to these most vulnerable of beings would be scant. In this case, both statements were more supportable than the majority believes, and any error in the admission of the June statement was clearly harmless.

II.

The harmlessness of any error here should be apparent. *See Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986). The June statement was unimportant in light of the state's otherwise strong case against Gregory. *See United States v. Crockett*, 813 F.2d 1310, 1315-16 (4th Cir. 1987). Gregory was not convicted in connection with any events surrounding the June statement. The September statement already identified Gregory and implicated him as the perpetrator of the September 7 crimes for which he was found guilty. The majority expresses concern that the jury may have taken the June statement as "sound corroboration" for LaTonya's identification of her father in the September statement. However, the September statement was soundly corroborated by no less than twelve separate factors enumerated by the district court. I summarize them briefly here: (1) LaTonya was in the physical custody of her father immediately before the September 7 statement was made; (2) Prior to arriving at her grandmother's house at 6:05 A.M. on September 7, LaTonya

would have been at home in bed, a fact compatible with the child's statement that her father molested her in bed while her mother was asleep; (3) LaTony's grandmother inferred that sexual abuse had occurred because she found an undried substance on the child's underpants which subsequent medical tests determined to be the result of vaginitis; (4) A medical examination of LaTonya on the afternoon of September 7 revealed inflammation and irritation of the child's vagina and was consistent with LaTonya's statement; (5) LaTonya had made a similar statement in June 1984; (6) In 1982, LaTonya and her father simultaneously had been diagnosed with gonorrhea, a sexually transmitted disease;[1] (7) LaTonya's statements to the doctor outside of the presence of her grandmother that her daddy had "unzipped his pants" and "told me do my legs apart" and "hurt me here [pointing to between her legs]" corroborated the statement; (8) LaTonya would be motivated to be truthful in

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[1] The majority suggests that the diagnosis does not necessarily imply a sexual contact between LaTonya and her father, noting the fact that LaTonya's uncle, Gideon Griffin, also tested positive for gonorrhea in 1982. However, there is no evidence in the record that Gideon Griffin was ever implicated by LaTonya or anyone else as having had sexual contact with her or that he ever had sole physical custody of the child. At Gregory's trial the parties stipulated to the fact of Gideon Griffin's 1982 diagnosis, but no exculpatory use was ever made of it, and the district court noted but attached no significance to it in its own analysis. I fail to see why the simultaneous diagnosis of gonorrhea in LaTonya and her father is somehow less significant or trustworthy because another individual, against whom no evidence has ever been offered, contracted a venereal disease. Indeed, Gregory himself makes no such argument in his brief on appeal.

her statements to the doctor because she perceived him as trying to help her; (9) LaTonya's version of the events had no internal inconsistencies; (10) A child of age three would be unlikely to spin a fabrication out of self-interest; (11) There is no evidence to suggest that LaTonya was influenced or coerced to identify her father as the perpetrator of sexual abuse; (12) Since LaTonya was within the parental control of her father and her negative statements could have made him angry, they could be regarded as statements against her personal interest.

The June statement was at most cumulative of the September statement and the "other overwhelming and largely uncontroverted evidence properly before the jury." *Brown v. United States*, 411 U.S. 223, 231 (1973). The June and September statements were virtually identical except for the substitution of the words "pooted in" for "put it in," and the implication of sexual molestation implicit in each is essentially the same. The June statement did not contradict either the later statement or any other evidence offered in the case. At most it tended to corroborate other, more detailed and admissible evidence. *See Schneble v. Florida*, 405 U.S. 427, 431 (1972).

It was clear to the North Carolina Court of Appeals that any error here was non-prejudical. *See North Carolina v. Gregory*, 338 S.E. 2d 110, 113 (N.C. Ct. App. 1985) ("in the light of all the circumstances of this case, the admission of the statement is at worst non-prejudicial error"). Why the majority rejects this conclusion is beyond me.[2]

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[2] The majority is properly worried about resting its analysis of the harmless error point solely on the grounds of waiver.

(Continued on following page)

Neither protection of the innocent nor respect for the criminal process is furthered by focusing on the "virtually inevitable presence of immaterial error" rather than upon "the underlying fairness of the trial." *Van Arsdall*, 475 U.S. at 681. The jury believed this child was sexually molested by her father, and the majority offers no basis for disbelief. Retrials, which may be less contemporaneous, more rehearsed, and less reliable, should be reserved for situations where it is clear that "there is a reasonable possibility that the improperly admitted evidence contributed to the conviction." *Schneble*, 405 U.S. at 432.

III.

The majority also refuses to consider the 1982 diagnosis of gonorrhea as part of the totality of circumstances that support the trustworthiness of LaTonya's June statement. The majority apparently concludes that only "contemporaneous" circumstances may be considered as "particularized guarantees of trustworthiness" under *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). Neither the

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This court has, for obvious reasons, always been cautious about saddling parties with "concessions" made at oral argument. The appellee vigorously argued the issue of harmless error in its brief, presumably to counter the government's presentation of the case against Gregory apart from the June statement. Addressing the harmless error question directly is preferable to finding a concession at argument which frankly seems at odds with much of the government's position in its brief.

language in *Ohio v. Roberts*, nor the analogous language of Fed. R. Evid. 803(24) and 804(b)(5), nor the cases cited by the majority construing these rules refer to any contemporaneity requirement. Even if I agreed with the majority's conclusion that only contemporaneous circumstances may be considered under the above hearsay exceptions, the Confrontation Clause, which governs here, is not merely a "codification of the rules of hearsay," *California v. Green*, 399 U.S. 149, 155-56 (1970), and *Ohio v. Roberts* makes no reference to the temporality of the required "particularized guarantees of trustworthiness."

Confrontation Clause analysis has always required an evaluation of each case on its facts rather than the application of a mechanical test. *Barker v. Morris*, 761 F.2d 1396, 1400 (9th Cir. 1985). The test is "whether the factors surrounding the making of the out-of-court statement, taken as a whole, indicate trustworthiness." *Id.* at 1403. Contemporaneous corroboration is one, but only one, such factor. For example, in *United States v. Dorian*, 803 F.2d 1439, 1444-47 (8th Cir. 1986), the court considered, under both Fed. R. Evid. 803(24) and *Ohio v. Roberts*, the trustworthiness of hearsay statements made by a five-year-old sexual abuse victim nearly one month after the alleged abuse could have occurred. The court concluded that the statement was trustworthy under both the Federal Rules and the Confrontation Clause based upon evidence spanning the period between the abuse and the statement, including the child's behavior on various occasions, statements made by her mother, inculpatory actions by the defendant, and medical evidence obtained five days after the alleged abuse and three weeks before

the statement. Under the majority's analysis, it is doubtful that any of these non-contemporaneous factors could have been considered. See also *Nelson v. Farrey*, 874 F.2d 1222, 1234 (7th Cir. 1989) (Flaum, J., concurring) (particularized guarantees of trustworthiness included child's behavior at the prospect of seeing her allegedly abusive father approximately three to eleven months before the hearsay statements were made).

To be sure, circumstantial guarantees of trustworthiness will often be contemporaneous. However, circumstantial evidence as a category includes many kinds of indirect evidence – both contemporaneous and non-contemporaneous – from which to evaluate the reliability of a statement. The importance of recognizing non-contemporaneous factors may be particularly great in child abuse prosecutions because "significant delays in reporting this abuse may occur because of confusion, guilt, and fear on the part of the child." *Morgan*, 846 F.2d at 947. *See Dorian*, 803 F.2d at 1444 ("it frequently takes a long time for children to share what is really going on and they may then do so in stages, telling a little more each time").

Courts should ask simply whether a circumstantial guarantee of trustworthiness is a strong one, not whether it does or does not fit into some judge-made category of "contemporaneity." Appellate judges buy nothing but trouble when they attempt to prescribe evidentiary litmus tests as a substitute for the reliability determinations of the presiding judge at trial. The drafters of the Federal Rules of Evidence and the Supreme Court majority in *Ohio v. Roberts* avoided this pitfall, and I am sorry to see the majority slip into it. The majority's position will inevitably lead to uncertainty as to how close in time to the

statement a guarantee of trustworthiness must be to qualify as a contemporaneous one.

The artificiality of the majority's focus on contemporaneity is amply illustrated by its discussion of the June statement. The trustworthiness of LaTonya's earlier statement is not merely a matter of "bootstrapping" it by the September events into a category of reliability, as the majority claims. Nor is her statement the likely product of a childish fantasy or some televised depiction. No fewer than seven out of the twelve factors which the district court found to be sound corroboration for the September statement apply equally to the June statement, including the earlier "non-contemporaneous" diagnosis of gonorrhea. The majority presumably holds this diagnosis to be irrelevant because it occurred in 1982, but I would consider it, albeit cautiously, as evidence of trustworthiness because the subject of the simultaneous diagnosis is the very same person about whom LaTonya later voiced her complaint and because there was no explanation, other than sexual contact with her father, offered for this child's venereal infection. Given the well-corroborated September statement and the circumstantial evidence that does support the trustworthiness of the June statement, any error in its admission was of the most marginal sort.

IV.

The majority expresses an interest in "contemporaneity" as a guarantor of reliability, but the irony of its position apparently escapes it. The result of its holding is the need for a retrial, if the witnesses can be located and remain in health (if witnesses are unavailable, the

retrial may compound the very problem of hearsay evidence that gave rise to this case). Nothing about the retrial will be in any way contemporaneous: the passage of time only renders evidence more suspect, not less.

Writs of habeas corpus ring hollow at this belated hour and after careful state court consideration of the case. The seeming flaw we have detected after flyspecking state process does not warrant resurrection of what has long been laid to rest. I respect the majority's concern for the perils inherent in child abuse prosecutions which may involve the most baseless and even vengeful accusations. Nothing of that sort is hinted here, however. Harmless-error doctrine recognizes that trial is an ordeal to which citizens should not lightly be subjected twice. By declining to apply the doctrine, the majority renders an event six years in this family's past one it may prove unable to forget.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

No. 87-424-HC

ST LUKE GREGORY, JR., Plaintiff, v. STATE OF NORTH CAROLINA, et al., Defendants.	)	ORDER (Filed November 14, 1988)

This case is before the court upon the respondent's objections to the Magistrate's Memorandum and Recommendation filed October 11, 1988, wherein the Magistrate recommended that the petition for habeas corpus filed by St. Luke Gregory, Jr. be granted. This order assumes that the reader thereof is fully, thoroughly and completely familiar with the contents of the memorandum.

The court agrees with and adopts the contents of the memorandum prior to Section V entitled Particularized Guarantees of Trustworthiness. It is at this juncture that the court will begin its discussion of the issues before it. Again, the following discussion assumes absolute familiarity with the memorandum.

In this case, Gregory was convicted of sexually molesting his 3 1/2 year old daughter. At the outset, one must recognize that the sexual abuse of a small child by a deviate parent presents unique features by reason of the parent-child relationship, some of which include the following:

1. The parent is the natural object of the child's love, affection and trust.

2. The child is accustomed to being submissive to the parent's direction.

3. The child is accustomed to the parent's physical proximity and bodily contact with the child.

4. The child is generally with the parent in surroundings with which the child is familiar, including the family's sleeping quarters.

The foregoing engender confidence of a child in a parent, and render a child, especially one of a very young age, easy prey to parental sexual abuse.

In addition to the child's confidence in the parent, the parent-child environment presents unique opportunities for parental abuse. The child sleeps in the house of the parent, apart from the observation of others. There are no viewers at hand to observe any wrongdoing, nor is a child of tender age apt to perceive a parental act as wrong according to the child's standard. Acceptance of the parent's conduct for a young child is the norm. In consequence, the child is unlikely to discuss abusive conduct with others, and if he should do so, it is unlikely that the recipient of such information will accept and fully comprehend such conduct for what it is. In sum, the only persons likely to know or have direct evidence of a parent's sexually abusive conduct are the parent, who is most unlikely to reveal the same, and the child, who lacks the motive, comprehension and capacity to evaluate or to disclose such conduct. Thus the more heinous the crime,

i.e. the younger the child, the less likely that the perpetrator will be brought to justice.

It is against the foregoing background that the defendant's confrontation rights must be weighed. The importance of the sixth amendment confrontation clause (made applicable to the states through the fourteenth amendment), cannot be understated, and the court adopts the discussion thereof appearing in *Ellison v. Sachs*, 583 F. Supp. 1241, 1245-46 (D. Md. 1984), *aff'd*, 769 F.2d 955 (4th Cir. 1985). The court agrees that when an unavailable hearsay declarant is not present at trial, his hearsay evidence must be excluded absent a showing of particularized guarantees of trustworthiness. The following comments of the Magistrate are pertinent in this regard.

> Although the hearsay statements do not fit within firmly rooted hearsay exceptions, they must still undergo further sixth amendment scrutiny. The Supreme Court has determined that 'reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.' *Ohio v. Roberts*, 448 U.S. at 66, 100 S.Ct. at 2531. Although the Court has not explained the meaning of 'particularized guarantees of trustworthiness,' it bears a resemblance to the requirement of 'circumstantial guarantees of trustworthiness' under the residual hearsay exceptions. Fed. R. Evid. 803(24), 804(b)(5); *United States v. Dorian*, 803 F.2d 1439, 1447 (8th Cir. 1986). In light of this similarity, the factors establishing a circumstantial guarantee of trustworthiness will also establish trustworthiness under the confrontation clause.

> Caselaw outlines several factors which determine if a statement has circumstantial guarantee of trustworthiness. First, the reliability of the statement 'is assessed in light of the circumstances at the time of the declaration.' *Renville*, 779 F.2d at 440. Second, the existence of corroborative, reliable evidence is an important factor to consider. *United States v. Bailey*, 581 F.2d at 349 (corroborative evidence, while not the sole basis of trustworthiness, clearly a factor to be considered). Third, the . . . [credibility] of the declarant must be considered. *Renville*, 779 F.2d at 440. Fourth, it is critical to consider the length of time between the event and the declarant's statement concerning that event. *United States v. White*, 611 F.2d 531, 538 (8th Cir. 1980), [*cert. denied*, 446 U.S. 992 (1980)]. Finally, in child abuse cases, the graphic language used by the child becomes a factor. *United States v. Dorian*, 803 F.2d 1439, 1445 (8th Cir. 1986).

The foregoing factors were correctly applied by the Magistrate to La Tonya's hearsay statement made to her grandmother three months before the events of September 7, 1984, (hereinafter June statement) and the court concurs that such statement is inadmissible, inasmuch as there is absolutely no objective corroborative evidence of the abuse reported at that time. La Tonya's independent statements on September 7, 1984, to her grandmother, and the doctor, respectively, are a different matter.

As to such statements, the court deems the corroboration thereof sufficient for their admissibility when viewed in the following perspective.

1. On September 7, 1984, at a little after 6 a.m., La Tonya was delivered by her father to her grandmother, and obviously was in his physical custody immediately

prior thereto. Her statement occurred about one hour later.

2. The time of such delivery (6:05 a.m.) immediately followed her nightly repose, a time she conventionally would have been within the home and in the presence of her father. La Tonya's statement that her father molested her in bed while the mother was asleep is compatible with the foregoing. Their interaction, if any, at such time was not likely to have been subject to third party observation. In sum, prior to her delivery to her grandmother, La Tonya was within the ambiance of the parent-child relationship, which, as previously discussed, uniquely affords opportunity for molestion.

3. That molestation had occurred was inferred by the grandmother from the appearance of the child's pants, which reflected an undried substance thereon.[1]

4. That the child's vagina was abnormally irritated and inflamed, as determined by the doctor's medical examination at approximately 2 p.m., was consistent with the child's statement.

5. The child had made the similar, though uncorroborated, (June) statement to her grandmother three months earlier. While such statement might be inadmissible at trial, such statement might be considered *by the court* as some indicia of the reliability of the September 7 statement itself.

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[1] Determined by subsequent medical tests to have been a substance free of sperm.

6. At an earlier time, both the father and the child had had gonorrhea, a sexually transmitted disease. Although her uncle had similarly been so infected, it can be inferred that the number of persons so diseased within the child's orbit of interaction was more restricted than the population generally.

7. The statement to the doctor corroborated the statement to the grandmother on the same day, but was not given to the doctor in the grandmother's presence.

8. There is an inference of some degree that the child perceived the doctor's purpose in examining her and in questioning her in conjunction therewith, as a course of action intended to help her, thus motivating her to be truthful with the doctor.

9. The child's version of the events contained no internal inconsistencies.

10. A child of 3 1/2 years would have little or no motivation to articulate a fabrication out of self interest.

11. The record is devoid of any suggestion that La Tonya was influenced or coerced at any time to identify her father as the perpetrator of the crime.

12. Being subject to her father's parental control and discipline, La Tonya's statements could be regarded as statements against her personal interest to the extent she might have feared or expected retribution for saying something bad about her father. The court doubts that a child of her tender age would be motivated toward veracity on this premise, however, just as it doubts that such a child would have any motive to fabricate a parent's identity.

Because of the unique factors presented by reason of the parent-child relationship and the opportunities for molestation presented by the same, and because of the uncontradicted medical evidence that molestation had occurred, this case differs markedly and may be distinguished from cases involving molestation by a stranger.

While the court is not faced with an issue arising under Fed. R. Civ. P. 804(b) (5) (non-specific hearsay exception predicated upon extrinsic trustworthiness), the court notes that La Tonya's September 7 statements conform with its requirements in that (1) her statements are offered as evidence of a material fact (the identity of her abuser); (2) her statement is more probative on the point for which it is offered than any other evidence which the prosecutor could procure through reasonable efforts (indeed, her statement as the victim, is almost certain to be the only evidence as to such identity); and (3) the admission of La Tonya's statements were also in keeping with the general purpose of the evidence rules, and the interests of justice are served by their admission in the context of the corroborative facts of this case. Without the statement, the State could not have proved the case. The tender age of the most material witness should not abort a prosecution when the statement by such witness is supported, in general, by corroborative facts.

As regards the rule's requirements, the record discloses that on March 8, 1985, (approximately six weeks prior to trial) the prosecutor made known to the defendant the prosecution's intention to offer La Tonya's statements and the particulars thereof. Such notice was sufficiently in advance of trial to provide the defendant with fair opportunity to prepare to meet such statements.

The court recognizes that the instant opinion is on the cutting edge of the issue of relaxation of confrontation clause requirements. Nonetheless, societal interests in protection of youth of tender age suggests that parental child abuse cases be resolved on a case by case basis, and that where the corroborative facts attain a sufficient level the child's statements be deemed sufficiently trustworthy to be admissible. As no general rule can be enunciated and as each case must be approached on an individual basis, the instant opinion should be regarded as fact specific.

Notwithstanding the court's conclusions as to the admissibility of the September 7 statement, the court is of the opinion that the Magistrate's Memorandum and Recommendation must be adopted, and the petition granted, inasmuch as the June statement was without any corroborative features whatsoever. The court agrees with the Magistrate's analysis that the admission of such statement did not constitute harmless error, inasmuch as the child's identification of the parent was the sole source of identification as to the perpetrator of the crime. Even had the September 7 statements been admitted, the effect of the June statement must be deemed so substantially prejudicial as to require its exclusion in order to afford the petitioner his constitutional rights. At the re-trial of this case, then, the court would not deem admissible the June statement. As heretofore indicated, however, the court would not so reason as to the September 7 statements to the grandmother and the doctor.

For the foregoing reasons, the petition for habeas corpus is herewith ALLOWED, and the State of North Carolina is DIRECTED to re-try petitioner within 120

days hereof, or, in the alternative, at the conclusion of such period, to effectuate his immediate release.

SO ORDERED.

This 9th day of November, 1988.

I certify the foregoing to be a true
and correct copy of the original.

J. Rich Leonard, Clerk
United States District Court
Eastern District

By /s/ E. L. Eggleston
Deputy Clerk

/s/ James C. Fox
JAMES C. FOX
United States District
Judge

ORIGINAL

No. 89-1771 (2)

IN THE

Supreme Court of the United States

October Term, 1990

STATE OF NORTH CAROLINA;
ATTORNEY GENERAL OF NORTH CAROLINA,
Petitioners,

v.

SAINT LUKE GREGORY, JR.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Does admission of a hearsay statement wholly devoid of contemporaneous objective corroborative evidence and otherwise lacking sufficient particularized guarantees of trustworthiness, violate a criminal defendant's rights under the confrontation clause?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Cases and Authorities	iii
Statement of the case	2
Statement of the facts	5
Reasons why Writ should not issue	7
Conclusion	13

TABLE OF CASES AND AUTHORITIES

Cases:

Chapman v. California, 386 US 18 (1967)..... 11

Coy v. Iowa, 487 US 1012 (1988)..... 11

Huff v. White Motor Corporation, 609 F. 2d 286, 292 (7th Cir. 1979)..... 10

Morgan v. Foretich, 846 F. 2d 941 (4th Cir. 1988)..... 10

Ohio v. Roberts, 448 US 56 (1980)..... 8

Nelson v. Farrey, 874 F. 2d 1222 (7th Cir. 1989)..... 11

United States v. Dorian, 803 F. 2d 1439, 1444 (8th Cir. 1986)..... 8

United States v. Nick, 605 F. 2d 1199 (9th Cir.)..... 8

United States v. Renville, 779 F. 2d 430, 440 (8th Cir. 1985)..... 8

Rules:

Federal Rule Evid. 803(4)..... 11

Federal Rule Evid. 803(24)..... 12

No. 89-1771

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

STATE OF NORTH CAROLINA;
ATTORNEY GENERAL OF NORTH CAROLINA,

Petitioners,

v.

SAINT LUKE GREGORY, JR.

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The above named Respondent, does hereby request the Court deny the petition for writ of certiorari filed on behalf on the State in Saint Luke Gregory, Jr. v. State of North Carolina, et al., _____F.2d____ (4th Cir., April 4, 1990) affirming Saint Luke Gregory, Jr., v. L.E. Cherry et al, Civil 87-424-NC, unpublished (E.D.N.C., November 14, 1988).

STATEMENT OF THE CASE

Saint Luke Gregory was indicted on September 24, 1984 in Pasquotank County, North Carolina for three felony charges: (1) attempted first degree rape, (2) incest, and (3) taking indecent liberties with a minor child, all arising out of one event which allegedly occurred on September 7, 1984.

Prior to trial, the state trial court conducted a competency hearing in order to determine the reliability of the alleged victim, LaTonya, the three and one-half year old daughter of Saint Luke Gregory. At the hearing the trial court determined LaTonya to be incompetent as a witness. Saint Luke Gregory proceeded to trial upon pleas of not guilty. The state presented no eyewitness testimony as LaTonya did not testify. Instead, both the evidence of sexual assault and the evidence linking Gregory to the assault were presented through the testimony of LaTonya's grandmother, Doris Griffin; LaTonya's treating physician, Dr. Green; and, certain test results admitted into evidence. At the trial, though Gregory did not himself testify, he offered exculpatory evidence on his behalf. The jury convicted on all three charges and Gregory was sentenced to imprisonment for ten (10) years on the attempted first degree rape and for a consolidated consecutive sentence of ten (10) years on the remaining two charges.

Gregory appealed his convictions to the North Carolina Court of Appeals which affirmed those for attempted first degree rape and taking indecent liberties. The court vacated judgment

and reversed the conviction on the count of incest due to insufficiency of the evidence as there was no evidence of any carnal intercourse. 78 N.C. App. 565, 338 S.E. 2d 110 (1985). Since the trial court had aggregated at sentencing the charges of incest and taking indecent liberties with a minor, the appellate court remanded the latter charge for resentencing.

Gregory petitioned the North Carolina Supreme Court for discretionary review. While awaiting the court's decision to accept his case for review, Gregory was resentenced on March 5, 1986, to five (5) years imprisonment on the indecent liberties conviction. On April 7, 1986, the North Carolina Supreme Court denied certiorari. 316 N.C. 382, 342 S.E. 2d 901 (1986)

Gregory commenced this action by a pro se application for writ of habeas corpus in the United States District Court for the Eastern District of North Carolina, filed May 20, 1987, Civil 87-424-HC.

Gregory raised in this action the claims denied at the state appellate level. The Attorney General of North Carolina filed an answer on October 17, 1987 moving for dismissal. The requirement of exhaustion with regard to the issues presented was unconditionally waived by the Attorney General. For purposes of preparation of written brief and oral argument before federal magistrate Wallace W. Dixon, James R. Parish, an attorney licensed to practice before the Eastern District was appointed to represent Gregory.

Oral arguments were heard before the federal magistrate on March 10, 1988. The issue argued, by counsels' agreement and

court order, was Gregory's claim that his rights of confrontation were violated by the trial court's admission of three hearsay statements, to wit: (1) the "June" statement of LaTonya's to her grandmother; (2) one made September 7 from LaTonya to her grandmother; (3) one made the same day to Dr. Green.

By memorandum of October 7, 1988, Magistrate Dixon recommended issuing the writ on the grounds that admission of each of the three hearsay statements violated Gregory's rights to confrontations. The state filed objections and Judge James C. Fox, United States District Court Judge for the Eastern District accepted in part and rejected in part on November 14, 1988, the magistrate's recommendation. He ruled only admission of the "June" statement constituted a confrontational violation, "inasmuch as there is absolutely no objective corroborative evidence of the abuse reported at the time."

The state appealed on December 12, 1988 to the United States Court of Appeals for the Fourth Circuit which affirmed in an opinion filed April 4, 1990, _____F.2d_____ No. 89-7514. The Court of Appeals agreed that admission of the "June" statement violated Gregory's confrontational rights since there was no contemporaneous evidence to corroborate the statement and that other evidence was "chronologically distant" presenting "a logically insufficient index of the reliability of the "June" hearsay."

The State petitioned the United States Supreme Court for a writ of certiorari.

STATEMENT OF THE FACTS

Saint Luke Gregory was charged and convicted of three sexual offenses - attempted first degree rape, incest and indecent liberties with a minor - arising from an act allegedly occurring on September 7, 1984. (not 1982 as stated in Government's Statement of Facts.) The alleged victim was his three and a half year old daughter LaTonya.

Prior to trial, the state trial court held a competency hearing in order to determine her reliability as a witness. At the hearing, LaTonya admitted that she would "tell things that did not happen." She felt this was "telling the truth." At the hearing LaTonya failed to describe the conduct by petitioner that would indicate he sexually attacked her. Further she testified that not only did she make up things about her father but that she enjoyed doing so. Based upon these statements, and others, the trial court determined LaTonya to be incompetent and unreliable as a witness. Thus the state presented its case primarily through the testimony of LaTonya's grandmother (Doris Griffin); LaTonya's treating physician (Dr. Green); and certain test results.

In September of 1982, Mr. Gregory, LaTonya and an uncle tested positive for gonorrhea. This evidence was admitted at trial under North Carolina Rules of Evidence 404(b) as a prior bad act for purposes of identification. Some three to four months prior to the September 7, 1984 statement LaTonya was delivered by her father, Gregory, to the grandmother's house on

his way to work as was the custom. LaTonya entered the house and said "Grandmama, my daddy pooted in my butt." [1]Doris Griffin told her to "shut up." Mrs. Griffin noticed nothing suspicious in the child's appearance or conduct. There was no complaint of pain or discomfort. There was no examination. Prior to September 7, 1984, the matter was never discussed again. The Court of Appeals for the Fourth Circuit noted that from the record Doris Griffin "seems to have dismissed the remark as a naive impertinence."

On September 7, 1984 Gregory dropped LaTonya off at Griffin's home and proceeded to work as he had been doing for most of the child's life. Later in the morning while preparing the child for her bath the grandmother observed LaTonya's panties contained a thick, milky, or yellowish liquid. Mrs. Griffin asked LaTonya about this and LaTonya told her grandmother "Daddy put it in my butt." The child pointed to her front. During the September 7th telling, LaTonya was crying. Doris Griffin (not Mrs. Dixon as State's Statement of Facts indicate) took her to Dr. Green who both questioned and examined LaTonya. The physical examination revealed irritation and soreness though lab test revealed no sperm or gonorrhea.

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[1]At trial the grandmother testified that "June" statement "My daddy pooted in my butt," was made about four months before September 7.

Further the examination did not reveal penetration by an object the width of a penis.

The trial court admitted the three hearsay statements of LaTonya.

The Federal District Court Judge and Fourth Circuit ruled inadmissible the first one --- the "June" Statement -- due to total lack of corroborative factors at the time of the declaration and the absence of reliable corroborative evidence chronologically close enough to positively affect the reliability of the statement.

These facts show the "June" statement inadmissible under the Confrontation Clause and the court conducted a proper harmless error analysis.

REASONS WHY THE WRIT SHOULD NOT ISSUE

This case presents a question of the constitutional propriety of introducing into evidence a hearsay statement wholly devoid of any contemporaneous corroborative features and lacking other sufficient particularized guarantees of trustworthiness.

The district court accepted the reviewing federal magistrate's recommendation that it rule inadmissible the "June" hearsay statement finding "absolutely no objective corroborative evidence of the abuse reported at that time."

The Court of Appeals, in affirming the district court's decision finding a violation under the Confrontation Clause,

reasoned the record contained "no corroborating evidence peculiar to the "June" statement" and the "chronologically distant evidence presented in this case to be a logically insufficient index of the reliability of the "June" hearsay."

The Fourth Circuit's ruling is thoroughly consistent with the requirements of "particularized" guarantees of reliability enunciated by Ohio v. Roberts, 448 U.S. 56 (1980) and is not inconsistent with the two other circuits as is claimed by the state.

Under the egis of Ohio v. Roberts, supra. at 66, a hearsay statement is admissible "only if it bears adequate 'indicia' of reliability. Reliability can be inferred where the evidence falls within a firmly rooted hearsay exemption. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." The circuit courts dealing with reliability of the declarant make the assessment based both in light of the circumstances at the time of the declaration and the perceived credibility of the declarant. See United States v. Renville, 779 F.2d. 430, 440 (8th Cir. 1985)("[T]he reliability of the declarant is assessed in light of the circumstances at the time of the declaration and the credibility of the declarant. see also United States v. Dorian, 803 F.2d 1439, 1444 (8th Cir. 1986) (quoting Renville); Huff v. White Motor Corporation, 609 F.2d 286, 292 (7th Cir. 1979); United States v. Nick, 605 F.2d 1199 (9th Cir. 1979).

The State argues, incorrectly, the Fourth Circuit has made contemporaneity talismanic of its search for particularized

guarantees of reliability. This is not the case; for the court reasoned that even without requiring contemporaneous corroboration the reliable evidence in this case was so chronologically distant as to be "a logically insufficient index of reliability" for the "June" statement.

The Court in Ohio v. Roberts, supra. requires an analysis that is factually specific to each case which the federal magistrate, district court and Fourth Circuit painstakingly conducted all with the same conclusion as to the "June" statment: that it lacked particularized guarantees of trustworthiness and therefore its admission violated the confrontation clause. Certainly where the declarant is found by the examining trial judge to be incompetent due to, inter alia, her willingness to fabricate about her father, there exists a greater requirement for strong contemporaneous indicia of truthfulness and reliability. The record is devoid of any reference in time of the alleged abuse claimed in the "June" statement. Additionally there exists no indication of the child's first opportunity to speak of the alleged abuse. The facts utterly fail to reveal any corroborative evidence from the declarant's demeanor to substantiate her assertion.

In the instant case there was absolutely no physical evidence to support the statement. No physical examination was conducted. No discomfort by the child was observed by the grandmother. No complaint was made by the child.

As noted by the Magistrate in his recommendations, the child's unreliability at trial does raise an inference that she

was unreliable at the time of the declaration. She admitted she made up stories about her father and the trial court found her unable to tell the truth with consistency. "Clearly," the magistrate wrote "therefore, [the child's] unreliability at the time of the statment must weigh in the balance against admissibility. "(J.A. 71-72) Further, her statements at her competency hearing diminish her reliability. At the hearing she admitted she did not tell the truth, lied about her father, made up stories about him, and enjoyed doing so. (J.A. 107, 111) A declarant ruled incompetent for the reasons stated by the state trial judge is an unreliable communicator of the facts. See Huff v. White Motor Corporation, supra. Incompetency for these reasons, unlike immaturity or "trial frights", impacts negatively on the reliability of the witness.

Lastly, the child's language describing the event is not graphic. Circuit courts have inferred veracity from the graphic language used by the child. e.g. Morgan vs. Foretich, 846 F.2d 941 (4th Cir. 1988), United States v. Nick, supra. In this case however, the language is vague and during the competency hearing trial the terminology used and its meaning were constantly disputed due to lack of clarity. Further, despite the terminology, the child had consistently pointed to her front rather than her posterior. (J.A. 130, 131, 108, 126, 128).

The court painstakingly analyzed evidence not contemporaneous to the statment, e.g. evidence of gonorrhea two years earlier, in determining the presence or absence of sufficient evidence of reliability. The court decided the

record was devoid of any evidence of abuse between 1982 and September 1984 and concluded the 1982 incident insufficient evidence to corroborate the "June" statement. The court declined to hold the chronologically distant 1982 incident and the September 1984 statement as sufficient particularized guarantees of trustworthiness to render the "June" 1984 statement reliable.

Finally the Fourth Circuit reasoned they could not say the admission of the "June" hearsay was harmless beyond a reasonable doubt. Coy v. Iowa, 487 U.S. 1012 (1988) states the harmless error standard of Chapman v. California, 386 U.S. 18 (1967) applies in cases revealing violations of the Confrontation Clause.

In its brief the state claims the opinion of the Fourth Circuit conflicts with the Seventh and Eighth Circuits in the cases Nelson v. Farrey, 874 F.2d 1222 (7th Cir. 1989) and United States v. Dorian, 803 F.2d 1439 (8th Cir. 1986). A cursory reading of those cases reveals the fallacy of this claim. Under Ohio v. Roberts, 448 US 56 (1980), the court promulgated a rule allowing the admission of hearsay evidence from an unavailable declarant if the evidence comes within a well recognized exception to the hearsay exclusion or, if not, that the evidence bears "particularized guarantees of trustworthiness" Id. at 66. In Nelson v. Farrey, supra. the hearsay statements of the child declarant were testified to by a clinical psychologists who treated her. The evidence was admitted under the well recognized exception of Rule 803(4), statements made for the

purposes of medical diagnosis. Similarly in United States v. Dorian, supra. the hearsay was evaluated by the courts and admitted pursuant to Rule 803(24), the residual clause after satisfying the five criteria; one of which was trustworthiness. In United States v. Dorian, supra. the courts cite Reville, supra. recognizing that the search is for indicia of reliability at the time of the declaration and the credibility of the declarant.

Further, in Dorian, that court spoke specifically of significant features corroborative of the girl's statements: her graphic description of the incident (lacking in our case); the defendant washing only the child's underwear the date of the incident which was an act unique in the annals of the marriage (lacking in our case); the mother's statements shortly after the incident that the defendant was trying to rape their daughter (lacking in our case); the child-declarant's disturbed behavior only days after the incident when told she would be returning to the home but the behavior disappearing when she learned the father would not be present (lacking in our case). Thus, in both cases cited as representing a conflicting view amoung the circuit courts, both of those courts following the strictures of Ohio v. Roberts, supra. ruled the hearsay statements admissible under specifically enumerated hearsay exceptions and thus could be inferred reliable. The court in Dorian went further in its analysis to point out corroborative facts. In the instant case, the courts ruled the "June" statement did not fall within a firmly rooted hearsay exception and, therefore, carried out the

alternate search, mandated by Ohio v. Roberts, for evidence of particularized guarantees of trustworthiness. Rather than reflecting a conflict amoung the circuit courts, the three cases represent the two different evaluations mandated by Ohio v. Roberts, supra.

In short, the conflict claimed to exist by the state is baseless and appears to have been made solely to secure a granting of the Writ.

CONCLUSION

For the reasons noted above there is no sufficient reason to issue a writ of certiorari: the well reasoned opinion of the Fourth Circuit should stand.

This the 13th day of June, 1990.

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FILING AND MAILING CERTIFICATE OF PRINTER

I hereby certify that on this 13th day of June, 1990, I filed with the Clerk's Office of this Court the required copies of this document and further certify that I mailed this same date from Richmond, Virginia the required copies to opposing counsel.

The necessary filing and mailing was performed in accordance with the instructions given me by counsel in this case.

E. Mae Benjamin
BRIEF PRINTING SPECIALIST

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89-1771
NO.

IN THE

Supreme Court of the United States

STATE OF NORTH CAROLINA;
ATTORNEY GENERAL OF NORTH CAROLINA,

Petitioners,

v.

SAINT LUKE GREGORY, JR.,

Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT

James Riley Parish
Attorney for Respondent
P.O. Drawer 1624
Fayetteville, NC 28302
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SUPPLEMENTAL BRIEF OF RESPONDENT

The above named Respondent does hereby request the Court, Pursuant to Rule 22.6 of the Revised Rules of the Supreme Court of the United States, to file this Supplemental Brief calling the attention of the Court to its recently decided opinion in Idaho vs Laura Lee Wright, 89-260, decided June 27, 1990, 47 CrL 2250. In the recently decided case of Idaho vs Wright, Id., the Court held that "particularized guarantees of trustworthiness must be shown from the totality of the circumstances, but we think the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief" at 47 CrL 2253. The holding of the Court is dispositive against this state's petition for writ of certiorari now pending before the Court.

The state takes issue with the Fourth Circuit's holding that a hearsay statement wholly devoid of any contemporaneous objective corroborative evidence is inadmissable as being violative of the Defendant's rights under the confrontation clause as the hearsay statement lacks the sufficient particularized guarantee of trustworthiness required by Ohio vs Roberts, 488 U.S. 56 (1980).

CONCLUSION

For the reasons noted in the brief in opposition and the recent case decided in this supplemental brief, the Court should not grant the State's Petition for Writ of Certiorari.

This the 17th day of July, 1990.

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CERTIFICATE OF SERVICE

The undersigned counsel for the above-named Respondent hereby certifies that a copy of the above was delivered to Richard N. League, Special Deputy Attorney General, P.O. Box 629, Raleigh, North Carolina, 27602 (919) 733-3109.

This the 17 day of July, 1990.

James R. Parish
Attorney for Respondent